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82-904

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSTRUCTORA EL MONTE, S.A., BENITO MONTEMAYOR, EVA MONTEMAYOR, MATIAS MONTEMAYOR, and CARMEN MONTEMAYOR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err when it dismissed the Petitioners'[1] appeal from a jury verdict and judgment entered in a forfeiture case, brought under 21, U.S.C., Sec. 881(a)(6), on the jurisdictional grounds that Notice of Appeal was filed prior to the disposition of pending pretrial motions in violation of F.R.A.P. 4(a)(4), when said Notice of Appeal was filed within 10 days from the trial court's entry of judgment for forfeiture, which partially granted and partially denied the Petitioners' pending post-trial motions that had been filed 42 days before entry of judgment?

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[1] Benito Montemayor, Eva Montemayor, Matias Montemayor, Carmen Montemayor, and Constructora El Monte, S.A., a Mexican corporation.

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Constructora El Monte, S.A., Benito Montemayor, Eva Montemayor, Matias Montemayor, and Carmen Montemayor hereby petition that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on September 8, 1982 and the subsequent denial of a Petition for Rehearing on October 12, 1982.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on September 8, 1982 (No. 82-2020). The United States Court of Appeals denied a petition for rehearing on October 12, 1982. The opinion is not reported in the Federal Reporter Second Series pursuant to Circuit Rule 28 and accordingly the court's order is printed in the Appendix at page 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. 1) was entered on September 8, 1982 dismissing petitioner's appeal from the judgment entered by the United States District Court for the Southern District of Texas, Brownsville Division on January 6, 1982 pursuant to F.R.A.P. 4(a)(4). A petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on October 12, 1982. (App. 3) The jurisdiction of this Court is involved under and pursuant to 28 U.S.C., Sec. 1254(1).

STATUTES INVOLVED

F.R.A.P. 4(a)(2) of 28 U.S.C. provides:

"Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

F.R.A.P. 4(a)(4) of 28 U.S.C. provides:

"If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b); to amend or make additional findings of fact, whether or not an alternation of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

F.R.A.P. 4(a)(5) of 28 U.S.C. provides:

"The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a) . . ."

F.R.A.P. 4(b) of 28 U.S.C. provides:

"APPEALS IN CRIMINAL CASES. In a criminal case the notice of appeal by a defendant shall be filed in

the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion . . ."

F.R.C.P. 59(b) of 28 U.S.C. provides:

"Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

F.R.C.P. 59(e) of 28 U.S.C. provides:

"Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

F.R.C.P. 79(a) of 28 U.S.C. provides:

"Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administration Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable . . . All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made."

STATEMENT OF THE CASE

On April 28, 1981 agents of the United States Drug Enforcement Administration entered the homes of petitioners at bar and seized real property and various items of personal property belonging to them. Other items of personal property belonging to petitioners were seized by drug agents on the same date at other locations.

Subsequent to the seizures, the government filed four separate complaints requesting that the real and personal property seized from Benito and Eva Montemayor be forfeited to the government, the personal property seized from Matias and Carmen Montemayor be forfeited, and that an airplane seized from a Mexican Corporation, Constructora El Monte, S.A., be forfeited, all under authority of Chap. 21, U.S.C., Sec. 881(a)(6).

On motion of the government, the four separate complaints were consolidated for trial. Even though the instant case proceeded from trial to present with seized horses as the named defendant, several parties claiming varied items of real and personal property are the actual interested parties.

On November 16, 1981 trial on the complaints for forfeiture was commenced before a jury, and on November 19, 1981 the jury returned a verdict against petitioners. On November 25, 1981 the judgment motion to amend judgment, motion for judgment notwithstanding the verdict, and a motion for instructed verdict. On December 16, 1981 the government filed a response to post-trial motions. Without any notice, the trial court on January 5, 1982 entered a final judgment of forfeiture. (App. 23) Upon learning of the final judgment, petitioners filed their notice of appeal on January 11,

1982. On January 18, 1982, the trial court denied, by written order, petitioners' post-trial motions. No record of the written order appears on the docket sheet (App. 11-23), and no notice of the written order or its filing was ever sent to the attorney for the petitioners. (App. 11-23)

Since the trial court's final judgment of forfeiture was dichotomized, returning property to claimants contrary to the court's and jury's findings, the petitioners conclusively presumed that the final judgment was a denial in part and a granting in part of petitioners' post-trial motions. The notice of appeal was filed notifying all necessary parties that an appeal was to be taken only as to the property that the court ordered forfeited to the government.

On May 17, 1982 a brief was filed for claimants-appellants, and on June 23, 1982 the government-appellee filed its brief. Both appellants and appellee urged the Fifth Circuit Court of Appeals to grant oral argument since the case at bar was one of first impression. Issues were raised concerning 21, U.S.C., Sec. 881(a)(6) which had not been addressed previously by an Appeals Court, and several jurisdictions throughout the United States anxiously awaited an interpretation of this new and important statute.[2]

After petitioners filed a reply brief, the Fifth Circuit Court of Appeals on its own motion dismissed the instant appeal on the grounds that the filed Notice of Appeal was a nullity because it was filed prior to disposition of post-trial motions. A petition for rehearing was filed by petitioners, but that petition was denied on October 12, 1982.

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[2] Chap. 21, U.S.C., Sec. 881(a)(6) was enacted and became law on November 11, 1978 and no case of any real merit had reached an Appeals Court.

REASONS FOR GRANTING THE WRIT

A.

THE TRIAL COURT RULED ON AND DISPOSED OF ALL PENDING POST-TRIAL MOTIONS WHEN IN ITS FINAL JUDGMENT ORDER IT GRANTED PART OF THE RELIEF SOUGHT BY RETURNING SOME OF THE SEIZED PROPERTY TO CLAIMANTS AND DENIED THE MOTIONS IN PART BY ORDERING FORFEITURE OF OTHER SEIZED PROPERTY.

In a forfeiture case brought under Chap. 21, U.S.C., Sec. 881(a)(6), the government has the initial burden of showing probable cause for the seizure, *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983 (5th Cir. 1980). At the point that the government established probable cause, the burden shifts to the claimant to show that the property in question is not subject to forfeiture. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978).

On November 16, 1981 a jury trial was commenced, and at issue was the seizure by drug agents of a house, airplane, horses, household furniture, and other varied items of personal property from several separate and distinct parties. At the close of the government's case, the trial court entered an order finding probable cause for all the seizures. On November 19, 1981 at the close of all the evidence, the jury found for the government and against the petitioners and the verdict was filed.

On November 25, 1982 the petitioners filed a motion for new trial, to vacate the judgment, to amend judgment, for judgment notwithstanding the verdict, and for instructed verdict. (App. 18) On December 16, 1981 the government filed a reply to all post-trial motions asking for forfeiture of all seized property.

On January 5, 1982 forty-two (42) days after filing of motions, the trial court entered a final judgment. The final judgment granted part of the relief sought in the post-trial motions when court ordered horses, cars, furniture, jewelry and many other items of personal property returned to the petitioners. (App. 4) This was contrary to the court's finding of probable cause and the jury verdict.

The court quite clearly denied the petitioners' post-trial motions in part, when it ordered the seized house, airplane, and various items of personal property forfeited to the government. In light of the well considered, lengthy, dichotomized judgment, the claimants conclusively presumed that the trial court had ruled on and disposed of all pending post-trial motions.

Notice of Appeal was filed on January 11, 1982. (App. 23). On January 18, 1982, the trial court filed a written order denying petitioners' post-trial motions. No copy of this order or notice of filing was ever sent to petitioners' attorneys, and no record of its filing appeared on the original docket sheet. (App. 11-23) The petitioners' attorneys first learned of the written order when the Fifth Circuit Court of Appeals dismissed the instant appeal *sua sponte*.

The denial of a motion by a District Court, although not formally expressed may be implied by the entry of final judgment or an order inconsistent with the granting of the relief sought by motion. The final judgment or inconsistent order is in effect a ruling on all pending motions. *Addington v. Farmer's Elevator Mutual Insurance Company*, 650 F.2d 663 (5th Cir. 1981); *Agostino v. Ellanor Packing Company*, 191 F.2d 576 (9th Cir. 1951); *Mosier v. Federal Reserve Bank of New York*, 132 F.2d 710 (2nd Cir. 1942). The Fifth Circuit Court of Appeals

chose to ignore its decision in *Addington*, a case directly on point and inconsistent with this opinion.

The determination of a motion is not always express, but may be implied. Thus the entry of an order inconsistent with granting the relief sought is a denial of the motion. So, also, the entry of final judgment in a cause is in effect an overruling of all motions pending prior thereto in the case. *Cohen v. Curtis Publishing Company*, 333 F.2d 974 (8th Cir. 1964), *cert. denied*, 380 U.S. 921, 85 S.Ct. 923 (1965).

The facts in *Calhoun v. United States*, 647 F.2d 6 (9th Cir. 1981) and the case at bar are virtually similar. *Calhoun* filed Notice of Appeal prior to the entry of an order denying his Rule 59 Motion, and motion was made to dismiss his appeal for the reason his Notice of Appeal was a nullity. Resolution of the issues involved consideration of F.R.A.P. 4(a)(2) and (4). Rule 4(a)(2) provides:

> "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order, but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

This amendment was designed to avoid the loss of the right to appeal by the filing of a notice of appeal prematurely. Absent the "except as provided" language of Rule 4(a)(2), the Notice of Appeal in this case would clearly be timely, having been filed after announcement of the judgment, although before formal entry of a separate order denying the motion.

The *Calhoun* court stated as follows:

> "Because of the 'except as provided' language of Rule 4(a)(2), we must consider the requirements of Rule 4(a)(4), which provide:

> "If a timely motion . . . is filed . . . the time for appeal shall run from the date of entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new Notice of Appeal must be filed within the prescribed time measured from the entry of the order. . . ."

We hold that the word "disposition" means announcement of the court's decision on the motion. This interpretation does not defeat the purpose of amending the rule. There is no significant possibility that a premature filing of a Notice of Appeal is likely to involve wasted effort or that the Notice of Appeal would not embrace objections to the denial of the post-judgment motion. Once a decision is announced, under Rule 58, an order should be prepared and entry should summarily follow.

An interpretation of the word "disposition" as meaning "announcement" of a decision gives meaning to the policy of "exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon." See *Williams v. Town of Okobojo*, 599 F.2d 238, 239-40 (8th Cir. 1979), quoting *Markham v. Holt*, 369 F.2d 940, 942 (5th Cir. 1966); see also *Anderson v. Allstate Insurance Company*, 630 F.2d 677, 681 (9th Cir. 1980). So construed, Rule 4(a)(4) is consistent with the purpose of Rule 4(a)(2), making ineffective only those notices of appeal filed before "announcement of a decision or order."

A contrary interpretation of Rule 4(a)(4) is fraught with injustice. A party may believe that an order has been made and entered when a decision is announced or filed and may act promptly to take an appeal, only to

find that the order was actually entered a day or two later. If Rule 4(a)(4) is interpreted to mean that the filing of a Notice of Appeal is a nullity because filed before formal entry of an order and if the time for filing a motion for extension of time based on excusable neglect has run, (see F.R.A.P. 4(a)(5)) valuable rights may be lost because an important, but ministerial, act was not performed when expected.

The distinctions between announcement of a decision, the filing of a judgment or order, and the entry of a judgment or order should not be utilized to create an abyss into which early appeals fall without effect. It would be contrary to the spirit of the rules to interpret the word "disposition" as meaning the date of a formal and proper entry of an order denying a post-judgment motion. We therefore hold that the Notice of Appeal was not a nullity under Rule 4(a)(4)."

B.

SINCE ALL POST-TRIAL MOTIONS REQUESTING RELIEF FROM THE JURY VERDICT AND TRIAL COURT'S ERRORS WERE FILED PRIOR TO ENTRY OF FINAL JUDGMENT, THEY WERE NULLITIES AND NOT PENDING WHEN NOTICE OF APPEAL WAS FILED.

Petitioners find it necessary to present this argument, as an alternative to Argument I, to demonstrate the frivolity of the Fifth Circuit Court of Appeals order dismissing the instant appeal. The Appeals Court used an unreasonably strict interpretation of F.R.A.P. 4(a)(4) to dismiss the appeal. Rule 4(a)(4) states that a Notice of Appeal filed before the dispostion of a timely filed petitrial motion shall have no effect. If the same rationale were followed, then the conclusion must be reached that a post-trial motion untimely filed would also have no ef-

fect and be a nullity. Therefore, all claimants' post-trial motions were nullities because they were filed prior to the trial court's final judgment entered on January 5, 1981.

Following the Appeals Court's reasoning, a review of the record would show:

November 19, 1981—
Trial court had found probable cause and the jury verdict was returned. (App. 22)

November 15, 1981—
Petitioners filed post-trial motions, but in accordance with Appeals Court's reasoning, no final judgment had been entered, and therefore the post-trial motions were premature and a nullity.

January 5, 1981—
Trial court enters written judgment. Since the prematurely filed post-trial motions were a nullity and not pending, nothing could extend the statutory and jurisdictional time for filing Notice of Appeal.

January 11, 1982—
Petitioners filed Notice of Appeal. No post-trial motions were pending to toll time for filing Notice of Appeal. (App. 23)

January 18, 1982—
Trial court enters order denying petitioners' post-trial motions. Since the filed post-trial motions were premature and a nullity, the trial court's order was a nullity and could not preempt and toll the time for filing Notice of Appeal. (App. 23)

Where no judgment has been entered, one cannot file post-trial motions attacking the judgment yet to be rendered. In *Friedman v. Typhoon Air Conditioning*, 31 F.R.D. 287 (E.D.N.Y. 1962) the court held that:

> "While Rule 59(e) provides that motions to alter a judgment must be served not later than 10 days after entry of the judgment, this limitation is not applicable here since no judgment had been entered when post-trial motions were filed. F.R.C.P. 58 provides that a judgment is not effective until noted in the civil docket as provided by F.R.C.P. 79(a)."

An untimely filed post-trial motion does not toll the running of the period for filing Notice of Appeal. *Browder v. Director Illinois Department of Corrections*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed. 2d 521 (1978); *United States v. Valdosta-Lowndes County Hospital Authority*, 668 F.2d 1177 (11th Cir. 1982). Contrary to the rationale of the Appeals Court, the *Valdosta* court held that the only practical way to avoid this clear injustice is to construe Rule 4(a)(4) as predicated entirely on a timely filing of post-trial motions. It should be noted that the Eleventh Circuit evolved from the old Fifth Circuit. The Eleventh Circuit held it was bound by the holdings of the former Fifth Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*). And, the history of the Fifth Circuit supports the position that if a post-trial motion was timely filed after a premature Notice of Appeal, the trial court could rule on the motion without making the Notice of Appeal a nullity. *United States v. Crescent Amusement*, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160 (1944). *Consor v. Occidental Life Insurance Company of California*, 469 F. Supp. 110 (N.D. Tex. 1979).

While the petitioners firmly believe that the issues presented to this Court should be decided in accordance with the rationale propounded in Argument A, the alternative argument presented herein highlights the inconsistent rationale of the Appeals Court. To conclude that the petitioners' Notice of Appeal was a nullity be-

cause it was filed prior to a ruling on post-trial motions, and then conversely conclude that untimely filed post-trial motions (*arguendo*) were not a nullity and were pending when the final judgment was entered is unreasonable.

C.

FUNDAMENTAL FAIRNESS AND EQUITABLE PRINCIPLES MANDATE ALL UNITED STATES COURTS OF APPEAL TO UNIFORMLY CONSIDER THE JURISDICTIONAL REQUIREMENTS OF F.R.A.P. 4.

Arguments A and B notwithstanding, the most reasonable and expeditious way in which to approach and dispose of the question presented in this petition is with a sense of fundamental fairness and exercise of equitable principles. To do otherwise would be a perversion of a just legal system and unreasonably punish the petitioners for a hypothetical, technical violation of the Federal Rules of Appellate Procedure. The petitioners had suffered through the seizures of homes, cars, and other valuable items of personal property, and then, after a trial presented critical first impression issues involving 21 U.S.C., Sec. 881(a)(6) for review, the United States Drug Enforcement Administration, prosecutors and defense attorneys throughout the country eagerly awaited an interpretation and opinion of a patently vague statute.

Prior to the 1979 Amendment to F.R.A.P. 4(a)(4), an appeal would not have been dismissed for the premature filing of notice of appeal unless prejudice was shown by a party and substantial rights were affected. *Stokes v. Peytons Inc.*, 508 F.2d 1287 (5th Cir. 1975). The Fifth Circuit overruled the *Stokes* decision in *Williams v. Bolger*, 633 F.2d 410 (5th Cir. 1980), holding that F.R.A.P. 4(a)(4) required strict statutory interpretation.

At the same time many other circuits looked to the old Fifth Circuit for guidance and chose to treat a failure to comply with the specifics of Rule 4(a)(4) as non-jurisdictional and apply equitable principles. The court in *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3rd Cir. 1981) looked upon the default in filing as non-jurisdictional due to a substantial forfeiture that would result and the absence of prejudice to the appellee. The Third Circuit further has noted its discretion under F.R.A.P. 4(a)(2), to suspend the requirements or provisions of the rules in a particular case.

The only parties that suffer from the dismissal of the appeal of the case at bar on the hypothetical technical jurisdictional issue under Rule 4(a)(4) are the petitioners. The United States Government never suffers when justice is done properly. The government could only benefit, especially when one considers the importance of the issues raised in appellant's brief.

The appeal involves a crucial question regarding the government's actions under the forfeiture statute 21, U.S.C., Sec. 881(a)(6). The government seized the property in this case using a novel theory under the subject statute, i.e., the net worth theory. No Appellate Court has ruled on the constitutionality of such a theory. Numerous courts are looking to the Fifth Circuit for guidance on this issue of seizures under 881(a)(6). While the instant appeal was pending before the Fifth Circuit, the government seized other property using the same novel theory.

While the Fifth Circuit deviated from the original Fifth Circuit's rulings regarding Rule 4(a)(4), other circuits now rely on the former Fifth Circuit's holding in *Markham v. Holt*, 369 F.2d 940 (5th Cir. 1966). The Ninth Circuit has adhered to the *Markham* policy of ex-

ercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged, not because something was done too late, but rather because it was done too soon. The Eighth Circuit upheld an appeal using equitable principles in a similar holding in *Williams v. Town of Okoboji*, 599 F.2d 238 (8th Cir. 1979).

Before a Notice of Appeal is ruled a nullity under F.R.A.P. 4(a)(4) the Appellate Court should also consider F.R.A.P. 4(a)(2). It provides in pertinent part:

> "Except as provided in (a)(4) of this Rule 4, a Notice of Appeal filed after the announcement of a decision or order, but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

The rule was designed to avoid the loss of the right to appeal by the filing of a Notice of Appeal prematurely. The committee comments further provide:

> "The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b) dealing with criminal cases, designed to avoid the loss of the right to appeal prematurely. Despite the absence of such a provision in Rule 4(a), the Courts of Appeals quite generally have held premature appeals effective."

Additional consideration should be given by this court to the fact that a forfeiture case is quasi-criminal in nature. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). There is also a great deal of authority that considers a forfeiture case criminal in nature rather than quasi-criminal due to the horrendous deprivation of property rights that result from a forfeiture action. F.R.A.P. 4(b) provides that a Notice of Appeal filed after the announcement of a decision in a criminal case, but before the entry of judgment or order shall be treated as filed after such entry and on the day thereof.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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